No. 78-1118

In the Supreme Court of the United States

OCTOBER TERM, 1978

PETER H. FORSHAM, ET AL., PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

LEONARD SCHAITMAN
MICHAEL KIMMEL
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-44a) is reported at 587 F. 2d 1128. The order of the district court (Pet. App. 45a-46a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1978. A timely petition for rehearing was denied on October 17, 1978 (Pet. App. 1a). The petition for a writ of certiorari was filed on January 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether records generated by government grantees are "agency records" under the Freedom of Information Act,

where the agency does not own the records, does not possess them, and did not supervise their production.

STATEMENT

1. The Department of Health, Education, and Welfare granted funds to the University Group Diabetes Program (UGDP) to conduct a long-term clinical study of the treatment of diabetes.[1] In the course of the study, the group discovered that certain harmful effects appeared to result from the use of orally administered drugs to combat the disease (Pet. App. 5a, 9a). As a result of the study and a follow-up study conducted by the Biometric Society, a private organization of biostatisticians, the Food and Drug Administration proposed that changes be made in the labeling of oral hypoglycemic drugs and recommended that the use of those drugs be curtailed (Pet. App. 9a-10a).

2. Petitioners, a committee and several physicians specializing in the treatment of diabetes, filed Freedom of Information Act requests with the Department of Health, Education, and Welfare, seeking to obtain the raw data underlying the UGDP's report. The Department denied the request and informed petitioners that the raw data were the property of the institutions participating in the UGDP study (Pet. App. 11a).

Petitioners filed suit in the District Court for the District of Columbia, seeking to force the Department to comply with their FOIA request. The district court dismissed the complaint on the ground that neither the

[1]The UGDP is a group of 13 private and state medical centers that had associated for the purpose of conducting the federally funded study (Pet. App. 6a-8a). The funds for the program were granted by the National Institute of Arthritis, Metabolism and Digestive Diseases, which is a part of the National Institutes of Health, which in turn is an organization within the Public Health Service of the Department of Health, Education, and Welfare (Pet. App. 6a).

Department nor any of its entities or employees were, or had ever been, in possession of the requested data. The court found that the data were the property of the UGDP study investigators and the UGDP coordinating center at the University of Maryland, and that neither the investigators nor the coordinating center is an "agency" covered by the Freedom of Information Act (Pet. App. 45a-46a).

3. The court of appeals affirmed, with one judge dissenting (Pet. App. 4a-44a). The court held, first, that the UGDP grantees are not federal agencies within the meaning of the Freedom of Information Act (Pet. App. 12a-13a). Second, the court held that the Freedom of Information Act does not require that an agency produce data in the possession of its grantees; only if the agency has created or obtained a record in the course of doing its work is there an agency record that can be demanded under the Act (Pet. App. 19a). Although the UGDP study group participants had agreed to be subject to audit by representatives of the Department, the court held that that agreement did not subject those participants to "accept rummaging by the world at large" under the Freedom of Information Act (Pet. App. 21a).

Judge MacKinnon concurred in the court's opinion, except for the portion suggesting that the Freedom of Information Act would apply not only to records in the possession of an agency but also to records the agency has a duty to obtain. As to records not in the possession of the agency, he stated, the applicability of the Freedom of Information Act should be determined case-by-case (Pet. App. 25a-26a).

Judge Bazelon dissented. He noted that the federal government provided all funding for the UGDP study, the government has an unrestricted right of access to the data, and the government has extensively relied on the UGDP study and data in regulatory action relating to the

treatment of diabetes. Under these circumstances, he concluded, the "degree of federal involvement with the UGDP raw data" is sufficiently great that they should be treated as agency records for the purposes of the Freedom of Information Act (Pet. App. 27a).

DISCUSSION

The question presented by this case is important for the administration of the Freedom of Information Act. Federal agencies contract with private entities in a variety of circumstances. Typically, the agency that grants funds to a private entity has some right of access to the records of that entity. If the Freedom of Information Act applies to documents held by a federal grantee because the agency has some right of access to the grantee's records, the effect on federal grant programs will be substantial.[2]

In our view, records of a federal grantee are not subject to disclosure under the Freedom of Information Act simply because the granting agency has a right of access to those records. The Act applies only to records that are in the custody or control of an "agency" at the time a disclosure request is made, and a grantee's receipt of federal funds does not turn it into a federal agency. *United States* v. *Orleans*, 425 U.S. 807 (1976).

It is well established that the Freedom of Information Act does not require agencies to create records; it merely requires the production of records in the agency's possession. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 162 (1975); *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 192 (1975). Similarly, the Act ordinarily does not authorize a court to order an agency to retrieve (or a non-agency to return) records that are no longer in the possession of an agency. The Freedom of Information Act simply entitles the requesting party to examine those agency records that are in the agency's possession at the time the request is made. See *Ciba-Geigy Corp.* v. *Mathews*, 428 F. Supp. 523, 531 (S.D.N.Y. 1977); *Nichols* v. *United States*, 325 F. Supp. 130, 137 (D. Kan. 1971), aff'd, 460 F. 2d 671 (10th Cir.), cert. denied, 409 U.S. 966 (1972). As was stated in the Attorney General's contemporaneous memorandum explaining the provisions of the FOIA, the Act "refers * * * only to records in being and in the possession or control of an agency. The requirement of this subsection imposes no obligation to compile or procure a record in response to a request." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 23-24 (June 1967).

Our submission that records must be in the possession or control of an agency in order to be subject to the mandatory disclosure requirements of the FOIA is consistent with the result reached by the court of appeals in this case. While the agency could have insisted on obtaining the records at issue in this case, it had not done so at the time of the FOIA request, and it had no duty to do so under the agreement between the Department and the UGDP grantee institutions. That is enough, we submit, to demonstrate that petitioners' claim must fail.

Petitioners argue that the court of appeals erred on several grounds in refusing to apply the Freedom of Information Act to the records at issue in this case. First, they contend (Pet. 15-19) that the district court erred in determining (Pet. App. 45a) that the UGDP raw data are the "property" of the UGDP investigators and grantee institutions, rather than the property of the United States.

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[2] "Right-of-access" provisions are common in federal grants and contracts. See, *e.g.*, 21 C.F.R. 312.10; 32 C.F.R. 7-104.15; 45 C.F.R. 74.23(a). See also *Eli Lilly & Co.* v. *Staats*, 574 F. 2d 904 (7th Cir.), cert. denied, No. 78-190 (Nov. 6, 1978). It is fair to say that federal agencies have a right of access to many documents in the hands of almost everyone who deals with the federal government, and almost everyone deals with the federal government.

Petitioners' contention is without merit. The government has never asserted title to the UGDP raw data. In none of the cases cited by petitioners was there any holding that raw research data generated by government grantees are government property, in the absence of an express or implied reservation in the grant documents. The general rule is that the working notes and data of professionals are their own and do not belong to the financial sponsor or client. See *Williams* v. *Weisser*, 273 Cal. App. 2d 726, 733, 78 Cal. Rptr. 542, 545 (1969); *Ablah* v. *Eyman*, 188 Kan. 665, 365 P. 2d 181 (1961).[3] In any event, the question of proprietary interest does not govern the availability of records under the Freedom of Information Act. Even if particular records belong to an agency, they are not subject to disclosure if they are not in the custody and control of the agency at the time they are requested.

Petitioners next contend (Pet. 20-23) that records produced by government grantees are "agency records" (regardless of lack of possession or ownership) because they are produced "in fulfillment of" national goals. This argument is equally lacking in merit. All records produced by government grantees and contractors (and many documents produced by persons who are neither grantees nor contractors) are in some sense produced "in fulfillment of" national goals or objectives. But this does not mean that, when it enacted the Freedom of Information Act, Congress intended to vest the public at large with a right to require an agency to obtain and produce the records of government grantees and contractors on demand. If Congress had meant to cast so broad a net, it would not have restricted the application of the Act to "agencies."

[3]The cases cited by petitioners (Pet. 16-18) deal with title to property generated in an *employment* relationship, or in the course of a contract where the contractee either expressly or by implication had reserved title to valuable work product. They therefore are inapposite here. Petitioners also cite several HEW regulations (Pet. 19), but none reserves title to the raw data at issue here.

Finally, petitioners contend (Pet. 25-27) that the data at issue in this case should be deemed "agency records" because the FDA has proposed to take regulatory action based in part on the published results of the UGDP study. Petitioners' argument is, in effect, that the Freedom of Information Act extends to records of private or state government entities, where those records have formed the basis of a published monograph and where the federal government has chosen to rely on that published monograph as a basis for proposed regulatory action. Nothing in the Act supports such an expansive construction, and petitioners cite no authority in support of this contention.

Although we therefore believe that the judgment of the court of appeals is correct, we do not oppose the granting of the petition for a writ of certiorari. The question presented here is closely related to the principal question presented in *Kissinger* v. *Reporters Committee for Freedom of the Press*, No. 78-1088, and *Reporters Committee for Freedom of the Press* v. *Kissinger*, No. 78-1217, in which we have urged the Court to grant review.[4] The cases present three aspects of a problem that is bound to recur until addressed by this Court: whether documents that are not in the possession of an "agency" nevertheless are subject to the FOIA. In No. 78-1088 the documents in question were generated within an "agency" but were removed before a request was made for their production; in No. 78-1217 the documents were created outside an agency, came into an agency's possession briefly, and then were removed before a request was made for production; here the documents never were in possession of an agency.

[4]We have provided a copy of our brief in Nos. 78-1088 and 78-1217 to counsel for petitioners.

The three cases together present the most important porblems that are likely to arise concerning access to documents not in the possession of an agency. Because a substantial portion of all FOIA cases are litigated in the District of Columbia Circuit, and because there is no reason to conclude that additional appellate opinions addressing other facets of the question will be of assistance to the Court in its resolution, we believe that the Court should grant review here and address these recurring problems that affect every federal agency.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

LEONARD SCHAITMAN
MICHAEL KIMMEL
Attorneys

MARCH 1979

DOJ-1979-03